

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1197

To be argued by
HAROLD JAMES PICKERSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1197

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIAM EUGENE ROBINSON,

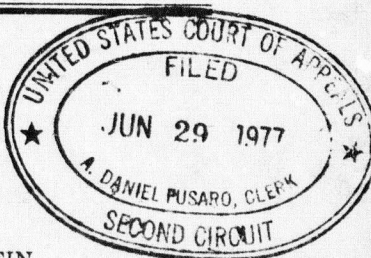
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

PETER C. DORSEY
United States Attorney
District of Connecticut
270 Orange Street
New Haven, Ct. 06508

HAROLD JAMES PICKERSTEIN
Chief Assistant United States Attorney
District of Connecticut
270 Orange Street
New Haven, Ct. 06508



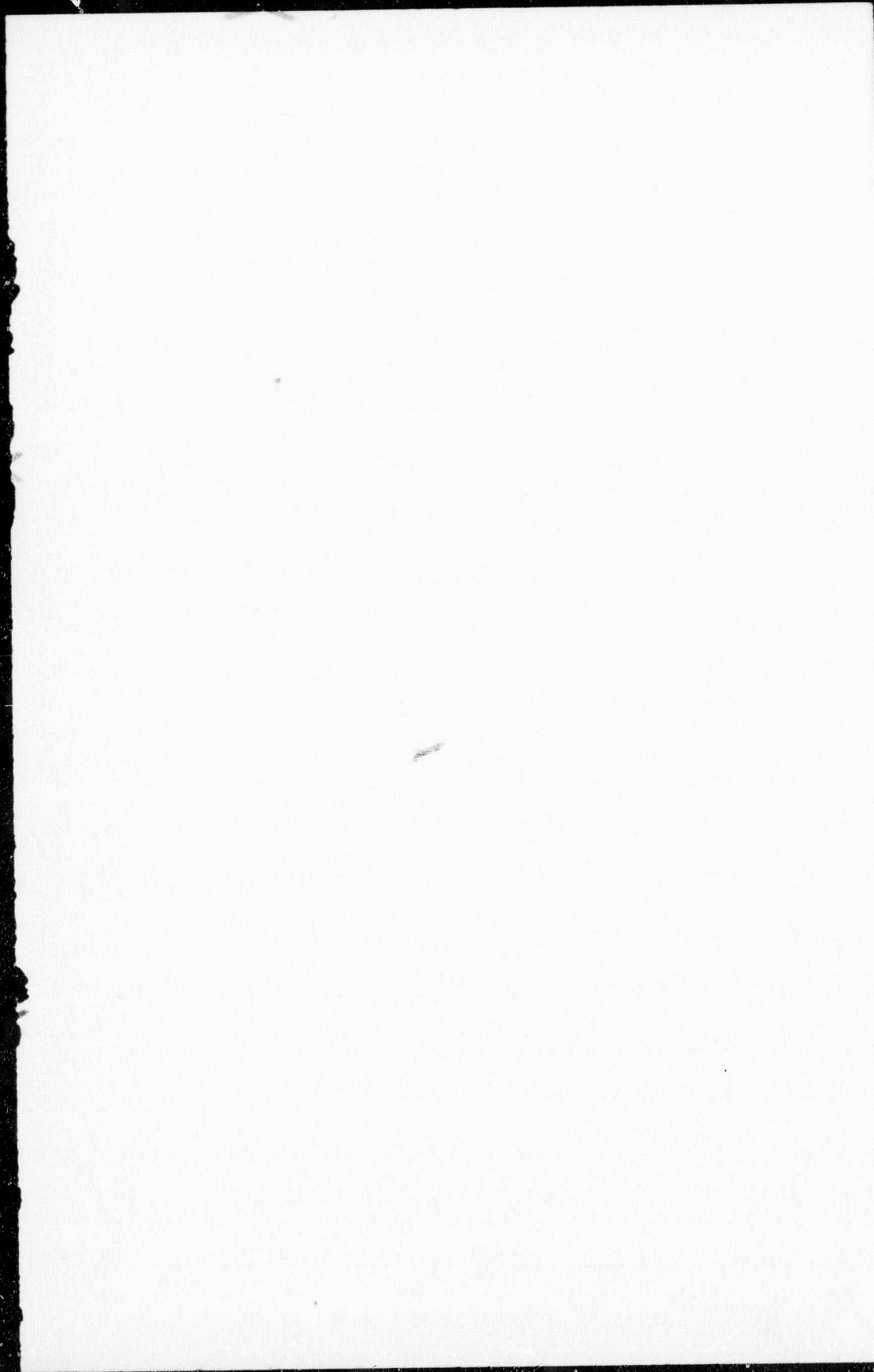


TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Statutes and Rules Involved	3
Questions Presented	4
Statement of Facts	5
ARGUMENT:	
I. The Admission of the business records of the Connecticut Labor Department was not error	8
II. The trial court did not err in refusing to follow its false exculpatory statement charge with an 18 U.S.C. § 3501 charge	13
III. The prosecutor did not improperly inject himself into his closing summation and did not prejudice appellant's right to a fair trial	16
IV. The government's peremptory challenge of the only Black veniremen did not deny ap- pellant a fair trial	21
CONCLUSION	26

TABLE OF CASES

<i>Berger v. United States</i> , 295 U.S. 78 (1935)	17, 18
<i>Davis v. United States</i> , 411 U.S. 233 (1973)	22
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637 (1974) ...	18
<i>Heike v. United States</i> , 192 F. 83 (2d Cir. 1911) ...	13

	PAGE
<i>Henderson v. United States</i> , 218 F.2d 14 (6th Cir.), cert. denied, 349 U.S. 920, rehearing denied, 349 U.S. 969 (1955)	18
<i>Holland v. United States</i> , 209 F.2d 516 (10th Cir.), aff'd, 348 U.S. 121 (1954)	13
<i>Lawn v. United States</i> , 355 U.S. 339 (1958)	19
<i>Leggroan v. Smith</i> , 498 F.2d 168 (10th Cir. 1974)	22
<i>Shotwell Manufacturing Company v. United States</i> , 371 U.S. 341 (1963)	22
<i>Swain v. Alabama</i> , 380 U.S. 202 (1965)	26
<i>T'kach v. United States</i> , 242 F.2d 937 (5th Cir. 1957)	13
<i>United States v. Barry</i> , 518 F.2d 342 (2d Cir. 1975) 14, 16	
<i>United States v. Benter</i> , 457 F.2d 1174 (2d Cir.), cert. denied, 409 U.S. 842 (1972)	17, 18, 19
<i>United States v. Bermudez</i> , 526 F.2d 89 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976)	15
<i>United States v. Birnbaum</i> , 373 F.2d 250 (2d Cir.), cert. denied, 389 U.S. 837 (1967)	16
<i>United States v. Bivona</i> , 487 F.2d 443 (2d Cir. 1973) 17, 18, 19, 20, 21	
<i>United States v. Briggs</i> , 457 F.2d 908 (2d Cir. 1975), cert. denied, 409 U.S. 986 (1972)	17
<i>United States v. Canniff</i> , 521 F.2d 565 (2d Cir. 1975), cert. denied, 423 U.S. 1059 (1976) ..	18, 19, 20, 21
<i>United States ex rel. Castillo v. Fay</i> , 350 F.2d 400 (2d Cir.), cert. denied, 382 U.S. 1019 (1966) ..	20

PAGE

<i>United States v. DeAlesandro</i> , 361 F.2d 694 (2d Cir.), cert. denied, 385 U.S. 842 (1966)	17, 18
<i>United States v. DeAngelis</i> , 490 F.2d 1004 (2d Cir.), cert. denied, 416 U.S. 956 (1974)	17, 19
<i>United States v. DeGeorgia</i> , 420 F.2d 889 (9th Cir. 1969)	12
<i>United States v. Dibrizzi</i> , 393 F.2d 642 (2d Cir. 1968)	18, 20
<i>United States v. Drummond</i> , 481 F.2d 62 (2d Cir. 1973)	19
<i>United States v. Gerry</i> , 515 F.2d 130 (2d Cir.), cert. denied, 423 U.S. 832 (1975)	18
<i>United States v. Grunberger</i> , 431 F.2d 1062 (2d Cir. 1970)	18
<i>United States v. Keane</i> , 522 F.2d 534 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976)	18, 20
<i>United States v. LaSorsa</i> , 480 F.2d 522 (2d Cir.), cert. denied, 414 U.S. 855 (1973)	17, 19, 20
<i>United States v. Lucchetti</i> , 533 F.2d 28 (2d Cir. 1976)	16
<i>United States v. Martinez</i> , 487 F.2d 973 (10th Cir. 1973)	20
<i>United States v. Mix</i> , 446 F.2d 615 (5th Cir. 1971) .	13
<i>United States v. Newman</i> , 549 F.2d 240 (2d Cir. 1977)	22, 23, 24, 26
<i>United States v. Robinson</i> , 421 F. Supp. 467 (D. Conn. 1976), rev'd sub nom. <i>United States v. Newman</i> , 549 F.2d 240 (2d Cir. 1977)	22
<i>United States v. Robinson</i> , 544 F.2d 110 (2d Cir. 1976)	2, 10, 13

<i>United States v. Salazar</i> , 485 F.2d 1272 (2d Cir. 1973), cert. denied, 415 U.S. 985 (1974)	21
<i>United States v. Santana</i> , 485 F.2d 365 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974)	17, 19, 21
<i>United States v. Socony-Vacuum Oil Company</i> , 310 U.S. 150 (1940)	18
<i>United States v. Thompson</i> , 420 F.2d 536 (3d Cir. 1970)	13
<i>United States v. Torres</i> , 503 F.2d 1120 (2d Cir. 1974)	21
<i>United States v. Tramunti</i> , 513 F.2d 1087 (2d Cir.), cert. denied, 423 U.S. 832 (1975)	17, 19, 21
<i>United States v. White</i> , 486 F.2d 204 (2d Cir. 1973), cert. denied, 415 U.S. 980 (1974)	18, 19
<i>United States v. Wilner</i> , 523 F.2d 68 (2d Cir. 1975)	18
<i>United States v. Zeidman</i> , 540 F.2d 314 (7th Cir. 1976)	13

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1197

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIAM EUGENE ROBINSON,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

This is an appeal from a judgment of conviction in the United States District Court for the District of Connecticut, entered by the Court (T. Emmet Clarie, C.J.) on March 21, 1977, after a jury verdict of guilty on February 15, 1977.

On March 10, 1977, a Grand Jury in New Haven, Connecticut, returned a three count indictment (Criminal No. N-75-20) charging appellant William Eugene Robinson and a co-defendant, David James Tate, with the armed robbery of the Trap Falls Office of the Connecticut National Bank, Shelton, Connecticut, on February 18, 1975, in violation of 18 U.S.C. §§ 2113(a) (b), and (d). On June 9, 1975, Tate entered a plea of guilty to Count Two of the indictment. On the same day a jury was impanelled before Judge Newman and the trial proceeded

as to Robinson. On June 13, 1975, the jury reported that it was unable to reach a verdict, and a mistrial was declared. On September 9, 1975, Tate was sentenced by Judge Zampano to a term of ten years.

On January 20, 1976, a jury was impanelled before Judge Zampano for the retrial. On February 3, 1976, the jury returned verdicts of guilty as to Counts One and Two of the indictment (which charged violations of 18 U.S.C. § 2113(a) and (b), respectively) and not guilty as to Count Three (charging a violation of 18 U.S.C. § 2113(d)). Robinson was sentenced to fifteen years on April 12, 1976.

Robinson appealed his conviction to this Court, and on October 29, 1976, in *United States v. Robinson*, 544 F.2d 110 (2d Cir. 1976), his conviction was reversed and the case remanded for a new trial. The Government's petition for a rehearing was denied by this Court on December 3, 1976.

On February 1, 1977, a jury for the third trial was selected before Chief Judge T. Emmet Clarie. On February 9, 1977, evidence began, and on February 15, 1977, the jury returned guilty verdicts on Counts One and Two of the indictment. On March 21, 1977, Robinson was sentenced to imprisonment for a period of fifteen years. Judge Clarie denied bond pending appeal.

Robinson appealed Judge Clarie's order denying bail and on May 24, 1977, this Court remanded the bail question to Judge Clarie for a more particular statement of reasons for the denial of bail, indicating that nothing with respect to the bail appeal should delay the instant appeal.

A timely notice of appeal was filed with this Court.

Statutes and Rules Involved**18 U.S.C. § 2113(a):**

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank credit union, or any savings and loan association;

* * *

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(b):

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both;

18 U.S.C. § 3501(a):

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

Rule 803(10), Federal Rules of Evidence:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(10) Absence of public record or entry. To prove the absence of a record, report, statements, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation or entry.

Questions Presented

1. Were the records of the Connecticut Department of Labor properly admitted into evidence?
2. Was the refusal of the trial court to follow its false exculpatory statement instruction with one on the voluntariness of statements under 18 U.S.C. § 3501 proper?
3. Was the rebuttal argument of the prosecutor proper?
4. Did the peremptory challenge by the Government of the only black venireman deny appellant a fair trial?

Statement of Facts

On Tuesday, February 18, 1975, at 1:55 P.M. the Trap Falls Office, Connecticut National Bank, Shelton, Connecticut, was robbed by three black males. T. 20, 99.* The sum of \$2,034.00 was taken. T. 20. One of the robbers was masked, T. 26 and was armed with a long barrelled weapon, T. 27; the other two robbers, including the defendant, were not masked. T. 176.

Two tellers, Retta Mondulick and Robert Welch, were in the bank at the time of the robbery. Both Welch and Mondulick identified the defendant Robinson as being one of the men who robbed the bank on that day. T. 20, 99. A bank surveillance camera in the bank was activated, and photographs from this camera were processed and were widely circulated in the area. Based upon an identification of the defendant Robinson, by an informant, an arrest warrant was issued on February 24, 1975. The following day, in an attempt to arrest the defendant, Special Agents of the Federal Bureau of Investigation went to his apartment; when no one responded to their knocks on the door, they broke in. Finding no one in the apartment, they left. Later that day, the agents returned to the apartment and engaged the defendant's wife in conversation. The defendant's wife invited the agents to the apartment and consented to a search of the premises. A leather coat, belonging to the defendant and resembling one worn by one of the robbers was taken. T. 242-43. This coat was identified as being similar to the one worn by one of the robbers. T. 42.

On February 28, 1975, the defendant surrendered to the Federal Bureau of Investigation.

* References marked "T." refer to the Trial Transcript.

Spreads of photographs, including a photograph of the defendant Robinson, were shown to both bank tellers. Both identified Robinson as one of the robbers. T. 47, 117.

Motions to suppress the photographic identifications were filed by Robinson, and were heard on June 5, 1975. On that day, Robinson inadvertently appeared in the hallway outside the courtroom where Welch and Mondulick were standing. Both immediately identified him as one of the robbers, even though they had not seen him since February 8, 1975. T. 43-44, 117-118. The motions to suppress the photographic identifications were denied.

David James Tate, who had also participated in the robbery, entered a plea of guilty to one count of the indictment against him, and, on September 9, 1975, received a ten year sentence. He did not testify at the defendant's first trial. On September 18, 1975, he was called to testify before a grand jury where he was questioned about the bank robbery. When he refused to testify, he was granted immunity pursuant to 18 U.S.C. § 6003; however, he persisted in his refusal to testify and was adjudged in contempt. Before the evidence began in the second trial of the defendant, in January, 1976, Tate decided to testify and did testify at the second trial. Subsequent to his testimony at the second trial, Judge Zampano granted Tate's motion to reduce his sentence, and reduced the sentence to 6 years.

At trial Tate testified that he robbed the bank on February 18, 1975, with the defendant Robinson. T. 162-69. He testified that he, the defendant, and one Luther Fleming, had met that morning, and, after looking at another bank to rob, T. 173 drove to the Trap Falls Office in Shelton. T. 176. He testified that he and Robinson entered the bank, where Robinson asked one of the tellers about employment. After remaining in the bank for a few months, either he or the defendant shouted,

"This is a stickup!"; T. 178 he then vaulted the counter and removed money from the tellers, T. 179 while Robinson held a gun on the tellers from the customers' side of the counter. T. 180. He stated that Fleming, who was masked, then entered the bank with a long barrelled weapon and covered the tellers T. 181; all three robbers then fled the bank and returned to Bridgeport, where they split the proceeds. T. 182. Tate testified that he then went to Florida and then to North Carolina, where he was apprehended. T. 183-84.

Robinson testified in his own defense and denied committing the robbery. T. 447. He testified that on the day of the robbery, he was working at his numbers business, and stated that from about noon on the day of the robbery until that evening, he was with one Joseph Burroughs. T. 430-33. Burroughs testified that he was with Robinson on the day of the robbery, T. 519-20 and testified that he remembered the day because he had to go to the unemployment office to collect an unemployment check. T. 530.

In rebuttal, the government called one William Kegler, an employee of the Connecticut Labor Department, who testified that a search of the records of the Connecticut Labor Department disclosed that no payment had been made to Burroughs on February 18, 1975, G.A. 101A * and further, that Burroughs received a check on February 10, 1975 in payment for the bi-weekly period ending February 8, 1975, G.A. 101A and that this was the last payment made to Burroughs by the State Labor Department until August, 1975. G.A. 103A.

* References marked "G.A." refer to the Government's Appendix.

ARGUMENT

I.

The Admission of the business records of the Connecticut Labor Department was not error.

The defense offered in this case was one of alibi. Joseph Burroughs, an employee of the defendant in his numbers business, testified that he had been with the defendant on the day of the bank robbery virtually continuously from about noon until late that evening, T. 415-498, with the exception of the time that he went to the unemployment office to pick up his check. T. 519-20. He used his going to the unemployment office as the way he remembered this particular day; he testified that this was the last time that he went to the unemployment office to pick up a check until sometime in June, July or August. T. 531.¹

In order to rebut this testimony, the government called William Kegler, an employee of the State Labor Department with familiarity with the unemployment security program. Kegler was the person responsible for conducting the search of the files of the Labor Department for Burroughs' records. G.A. 50A. Kegler testified that during the year 1975 an individual would appear at the Unemployment Compensation Office to receive his check on a bi-weekly basis, G.A. 51A, and that he would receive compensation for the preceding two week period at that time. Kegler described the search that he had personally conducted of Burroughs' records G.A. 54A, 55A, and he described in great detail the manner in which the particular records were generated in the department. G.A. 61A,

¹ This was substantially the same testimony as had been offered in the two previous trials.

63A. He testified that while he was able to find almost all of Burroughs' records, one voucher, for February 8, 1975, and its accompanying check, were missing. G.A. 63A, 64A. However, he testified that a payment had been made to Burroughs for the two week period ending February 8, 1975, because both the ledger maintained in the main office of the Labor Department and the claim record card filled out by the local unemployment office in Bridgeport indicated a payment to Burroughs for that period on February 10, 1975. G.A. 64A. He further testified that he found no record that any payment whatever had been made to Burroughs on February 18, 1975, the day of the bank robbery. G.A. 72A. The payment for the period ending February 8, 1975, was the last payment that had been made to Burroughs until August, 1975, G.A. 78A. Additionally, Kegler testified that beginning with August, 1974, there was a continued two week pattern of payments to Burroughs, and that his records indicated that Burroughs picked up all of the checks due him during this period on the day indicated. G.A. 85A-88A.

Particular significance should be given to this pattern of payments to Burroughs since Kegler testified that when an individual picks up his check at the local office he signs for it on a claim record, which is then transmitted to the central office of the Labor Department, where the information on the claim record is transferred to the computerized ledger. G.A. 96A. Thus, beginning with January 1, 1975, the first bi-weekly period ended on January 11, 1975; both the ledger and the cancelled check indicated payment to Burroughs on January 13, 1975.² The next bi-weekly period ended on January 25, 1975; the ledger and corresponding check indicates payment to Burroughs on January 27, 1975. The next bi-weekly period ended on February 8, 1975; the ledger in-

² The bi-weekly periods end on a Saturday; payment to the claimant is made the following Monday.

dicates payment to Burroughs on February 10, 1975, but the check actually making the payment was missing.³ With this payment, Burroughs exhausted his regular benefits and did not begin collecting extended benefits until August, 1975. G.A. 101A.

Rule 803(10) of the Federal Rules of Evidence creates an exception to the hearsay rule to cover precisely the situation here, proving the non-occurrence of an event by the lack of an official record where an entry would have been made had the event itself occurred. This is in accordance with pre-existing law. See 5 J. Wigmore, *Evidence* § 1522 (Chadbourn rev. 1974); 4 J. Weinstein, *Federal Rules of Evidence* ¶ 803(10)[01] (1976). As Professor Wigmore notes.

The habit and system of making such a record with regularity calls for accuracy through the interest and purpose of the entrant; and the influence of habit may be relied on, by very inertia, to prevent casual inaccuracies . . .

5 J. Wigmore, *Evidence*, § 1522 at p. 442.

It is true that the rule requires that a diligent search of the records be conducted. But just such a search was conducted here, and the person who conducted the search, Kegler, was present in court.⁴ The defendant claims that the absence of the February 8, 1975, check is enough

³ Kegler offered an explanation for the missing check, G.A. 75A, by stating that the individual who issued this check misstated the check number on the check number tape at the local office.

⁴ Contrast this situation with the one in the second trial, where the person who testified was not the person who had conducted the records search. *United States v. Robinson*, 544 F.2d 110 (2d Cir. 1976).

to make all of the records unreliable, and therefore inadmissible. He further argues that the confusion of the records makes them unreliable, even though Kegler testified that while a backlog existed in 1975, and probably at the time of the second trial, in early 1976, all of the records had subsequently been compiled when he conducted his search in December, 1976 and January, 1977. G.A. 56A.

The defendant's argument wholly misconstrues the pattern of payments to which Kegler testified. The record here establishes a pattern of payments reflected on the computerized ledger—all save one of which are corroborated by the existence of the underlying documents.⁵ The pattern so established is clear—Burroughs' period of unemployment benefits always ended on a Saturday, and he always picked up his check when it was issued the following Monday.

Furthermore, Kegler himself testified that the ledger would not reflect payment to Burroughs unless the check had actually been picked up. G.A. 93A. It is therefore clear that the only way in which the account ledger would indicate a payment to Burroughs on February 10, 1975, was if Burroughs had actually picked up his check on that day.

The records thus relied upon by the government are inherently reliable, see 5 J. Wigmore, Evidence § 1633 at p. 624 (Chadbourn rev. 1974); id at § 1531, the record below to indicate that any of the provisions of F. R. Evid. 803(10) were violated by the admission of these records and this testimony. Even the authority relied

⁵ It is for precisely this reason that live testimony, rather than the certification method provided for by the Rule, F.R. Evid. 803(10) was presented.

upon by the defendant, *United States v. DeGeorgia*, 420 F.2d 889 (9th Cir. 1969), supports admissibility here, for the court in *DeGeorgia* states at page 893:

Regularly-maintained business records are admissible in evidence as an exception to the hearsay rule because the circumstance that they are regularly-maintained records upon which the company relies in conducting its business assures accuracy not likely to be enhanced by introducing into evidence the original documents upon which the records are based.

In our view, this same circumstance offers a like assurance that if a business record designed to note every transaction of a particular kind contains no notation of such a transaction between specified dates, no such transaction occurred between those dates. Moreover, in our opinion, that assurance is not likely to be enhanced by the only other means of proving such a negative; that is by bringing into court all of the documents involving similar transactions during the period in question to prove that there was no record of the transactions alleged not to have occurred, and calling as witnesses all company personnel who had the duty of entering into transactions of that kind during the critical period and inquiring whether the witnesses remembered any additional transactions for which no record had been produced.

These records are regularly maintained, and the ledger is itself relied upon by the Connecticut Labor Department. The records thus have all of the indicia of reliability required by the Rules of Evidence, and were properly admitted here.

The defendant also claims that the admission of these records denied him his Sixth Amendment right of con-

frontation. It has been uniformly held that the introduction of such records does not work a denial of a Sixth Amendment right. *Heike v. United States*, 192 F. 83, 94-5 (2d Cir. 1911); *United States v. Thompson*, 420 F.2d 536, 545 (3d Cir. 1970); *T'kach v. United States*, 242 F.2d 937, 938 (5th Cir. 1957); *Holland v. United States*, 209 F.2d 516, 521 (10th Cir.), *aff'd*, 348 U.S. 121 (1954); *United States v. Mix*, 446 F.2d 615, 622 (5th Cir. 1971).

The prior decision of this court in this case, *United States v. Robinson*, *supra*, is not dispositive here. The court there held that "proof of a search that has been less than diligent is inadmissible to prove the absence of a record." ID. at 115. There, the man who had conducted the search—Kegler—was not in court to testify; the witness who did testify was a local employee of the Labor Department who had merely been given the file and sent to court. Here, of course, Kegler did testify as to the search he had conducted. This court's previous decision did not forever rule this evidence inadmissible; it only required proof of a diligent search under Rule 803(10). That requirement has been met here. See *United States v. Zeidman*, *supra*, at 318 (dealing with F. R. Evid. 803(7)).

II.

The trial court did not err in refusing to follow its false exculpatory statement charge with an 18 U.S.C. § 3501 charge.

The defendant claims error in the failure of the trial court to follow its false exculpatory statement instruction, T. 661, with the instruction mandated by the provisions of 18 U.S.C. § 3501. The defendant, subsequent to his arrest, was taken to the F.B.I. Office in Bridgeport.

Special Agent Smith testified that after he showed the defendant a bank surveillance photograph of the robbery, the defendant said, "That's Tate". T. 249-50. On cross-examination, the defendant denied making this statement. T. 480. Smith also showed the defendant a coat which had been taken from his apartment; the defendant identified the coat as his. T. 247-48. Robinson also told Smith that on the day of the bank robbery he was at a certain location in Bridgeport. T. 284-88.

At no time did the defendant ever seek to suppress the statements that he gave to Special Agent Smith. No motion, either before trial or during it, was ever made pursuant to 18 U.S.C. § 3501; indeed, prior to this trial, the defendant had known that this testimony would be offered, since the same testimony had been offered in two previous trials.

This court, in *United States v. Barry*, 518 F.2d 342 (2d Cir. 1975), held that a standard jury instruction that it is the duty of the jury to consider and weigh the evidence, and to determine all of the facts, without specific reference to the confession and the voluntariness issue, was insufficient to comply with the requirements of 18 U.S.C. § 3501. Yet here, there is simply no issue as to the voluntariness of any of the statements which were made to Special Agent Smith. The defendant offered no evidence that the statements were not voluntary; even on appeal, the defendant does not make this claim. He rather urges that because the trial judge gave a false exculpatory statement instruction, which used the word voluntary, he is then required to automatically give a § 3501 instruction, whether or not requested.

The defendant here, however, apparently recognizing that his failure to raise a voluntariness issue precludes his entitlement to a § 3501 instruction, nevertheless urges that since the trial judge himself raised the issue of

voluntariness in his false exculpatory statement instruction, he must thereafter give the § 3501 instruction. The instruction given here is virtually identical with that in 1 Devitt & Blackmar, *Federal Jury Practice and Instructions* § 15.12 (1977). The instruction is general in its terms, and does not single out any particular statements of the defendant. Moreover, the defendant never objected to the failure of the court to giving a § 3501 instruction; his only objection was to the giving of a false exculpatory instruction at all. App. 57.* As this court noted in *United States v. Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976):

In the absence of clear error by the trial court in its instructions, failure to make timely request for, or objection to, instructions to the jury waives all objections to the charge given. Fed. R. Crim. P. 30.⁶

The statements offered by the government raised issues of credibility: did the jury believe that the defendant had identified Tate in the bank surveillance photograph? Did they believe that he had identified his coat when shown it by Special Agent Smith? Did they believe that he was on a street corner in Bridgeport at the time of the robbery, or that he was in Shelton, Connecticut, robbing a bank? No issue was raised by the defendant as to the voluntariness of these statements, and no evidence was presented to the jury from which they might infer that the statements themselves were in-

* References marked "App." refer to Appellant's Appendix.

⁶ The defendant claims that had he known that the trial judge was going to give the false exculpatory statement instruction, he would then have been able to request the § 3501 instruction. This misapprehends his lack of entitlement to the instruction altogether; there was simply no issue before the jury on the issue of voluntariness.

voluntary. Under these circumstances, the defendant was not entitled to an instruction to the jury in conformity with 18 U.S.C. § 3501.

Even assuming arguendo that the defendant was entitled to a § 3501 instruction, nevertheless, the failure to give such an instruction was not sufficiently prejudicial to vitiate the jury's verdict. *United States v. Barry*, 518 F.2d 342, 348 (2d Cir. 1975); *United States v. Lucchetti*, 533 F.2d 28, 40 (2d Cir. 1976); *United States v. Birnbaum*, 373 F.2d 250, 257 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967). The statements involved were only a small part of the government's case against the defendant: he was identified by the two tellers inside the bank, and his participation in the robbery was fully detailed by Tate, a convicted co-defendant. Thus, the case is dissimilar from *Barry, supra*, where apart from the defendant's confession, the only direct evidence linking Barry to the crime came from a co-defendant who was awaiting sentencing. The error, if any, in not giving the § 3501 instruction, was thus harmless.

III.

The prosecutor did not improperly inject himself into his closing summation and did not prejudice appellant's right to a fair trial.

Throughout the trial, the prosecutor properly maintained his role as enunciated by the Supreme Court in the following:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal

prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger v. United States*, 295 U.S. 78, 88 (1935).

Great latitude is given to the prosecutor in both his opening summation and rebuttal in order to allow him to properly exercise his role and because "the jury's charge and the jury's good sense can be counted on to set things right." *United States v. Santana*, 485 F.2d 365, 371 (2d Cir. 1973); *cert. denied*, 415 U.S. 931 (1974); *United States v. Bivona*, 487 F.2d 443, 447 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *United States v. Benter*, 457 F.2d 1174 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972); *United States v. DeAlesandro*, 361 F.2d 694, 697 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966); *United States v. Briggs*, 457 F.2d 908, 911-912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972); *United States v. Tramunti*, 513 F.2d 1087, 1118-1119 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. DeAngelis*, 490 F.2d 1004, 1011-1012 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974) (Mansfield, J., concurring); *United States v. LaSorsa*, 480 F.2d 522, 526 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973).

Similarly this Court has said that:

A prosecuting attorney is not an automaton whose role on summation is limited to parroting facts

already before the jury. He is an advocate who is expected to prosecute diligently and vigorously, albeit without appeal to prejudice or passion.

United States v. Wilner, 523 F.2d 68, 74 (2d Cir. 1975):

As an advocate, he is not restricted to a "sterile recitation of uncontroverted facts." *United States v. Keane*, 522 F.2d 534, 560 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976). He is allowed to "marshal all inferences that the evidence supports." *United States v. White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974), and within broad limits, he is allowed to argue the inferences which he wishes the jury to draw from the evidence. *United States v. Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968); *United States v. Wilner*, 523 F.2d 68, 73 (2d Cir. 1975); *United States v. Gerry*, 515 F.2d 130, 144 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). He can "indulge in non-prejudicial flourishes of rhetoric" in his summation which can reach "dramatic heights" and "be characterized as overly flamboyant but not prejudicially inflammatory." *United States v. White*, *supra*; *United States v. DeAlesandro*, *supra*, at 697. *Henderson v. United States*, 218 F.2d 14 (6th Cir.), *cert. denied*, 349 U.S. 920 (1955), *rehearing denied*, 349 U.S. 969 (1955). Furthermore, his summation must be viewed in the totality of the entire trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 639 (1974); *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 239, 242 (1940); *Berger v. United States*, 295 U.S. 78, 85, 89 (1935); *United States v. White*, *supra*; *United States v. Bivona*, *supra* at 446; *United States v. Benter*, *supra* at 1178; *United States v. Canniff*, 521 F.2d 565, 566 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); *United States v. Grunberger*, 431 F.2d 1062, 1069 (2d Cir. 1970).

There are several factors which must be considered in determining whether or not the comment was improper:

1. Was the comment lifted out of context so it is distorted? *United States v. Canniff*, *supra* at 571.
2. Was the comment based on evidence in the record or on personal opinion? *United States v. Canniff*, *supra*.
3. Was the comment part of a one time instance or part of a consistent pattern of misconduct not only in the particular trial but also in other cases? *United States v. Drummond*, 481 F.2d 62 (2d Cir. 1973); *United States v. Canniff*, *supra*.
4. What were defense counsel's tactics? Did they invite or provoke the prosecutor's response? *United States v. Canniff*, *supra*; *United States v. Tramunti*, 513 F.2d 1087, 1119 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *Lawn v. United States*, 355 U.S. 339, 360 (1958); *United States v. Bivona*, 487 F.2d 443, 446 (2d Cir. 1973); *United States v. LaSorsa*, 480 F.2d 522, 526 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *United States v. Benter*, 457 F.2d 1174 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972); *United States v. Santana*, 485 F.2d 365, 370 (2d Cir.), *cert. denied*, 415 U.S. 931 (1973); *United States v. DeAngelis*, 490 F.2d 1004, 1011 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974) (Mansfield, J., concurring).
5. Was proof of defendant's guilt overwhelming? (Even if there was improper prosecutorial conduct). *United States v. White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974); *United States v. Bivona*, *supra*, at 447; *United States v. Benter*, 457 F.2d 1174, 1178 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972).

6. Was there a court instruction telling the jury to disregard the prosecutor's comment or to be the sole judge on the issues? *United States v. Bivona, supra*; *United States v. Canniff, supra* at 567.
7. Was there a constitutional infringement or an effect on defendant's substantial rights? *United States v. Bivona, supra*; *United States v. Dibrizzi, supra*; *United States ex rel. Castillo v. Fay*, 350 F.2d 400 (2d Cir.), *cert. denied*, 382 U.S. 1019 (1965).

In the instant case, the defendant complains of one comment made by the prosecutor in rebuttal. Immediately after the comment was made, the defendant objected and the jury was instructed to disregard the statement, App. 25. Under these circumstances, there was clearly no prejudice to the defendant. A prosecutor may properly stress the credibility of witnesses, see, e.g., *United States v. Keane*, 522 F.2d 534, 561 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976). Here, David James Tate was attacked in the defendant's summation, as a convicted felon, a drug pusher, a liar and a man who dealt with the government only out of his own self interest. G. A. 41A-43A. The government had previously argued to the jury that they should view Tate's testimony "with great caution." The prosecutor's statement, that "[I]f you are concerned that the government has made a deal with Tate, be concerned with me. I made the deal. It is my responsibility." App. 25, was simply an attempt to counter the defendant's vigorous attack on Tate's character. The prosecutor was not injecting his own integrity into the case to enhance the witness's credibility, see *United States v. Martinez*, 487 F.2d 973, 977 (10th Cir. 1973), nor was he using the prestige of the federal government to bolster the witness, see *United States v. LaSorsa*, 480 F.2d 522, 526 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973), nor did the statement exceed the

standards of fair and permissible argument. See *United States v. Torres*, 503 F.2d 1120, 1127 (2d Cir. 1974); *United States v. Salazar*, 485 F.2d 1272, 1280 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); cf. *United States v. Santana*, 485 F.2d 365, 370-1 (2d Cir. 1973).

In *United States v. Tramunti*, 512 F.2d 1087, 1118-19 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975), a comment of the prosecutor which invited the jury to "try us all" was held proper viewed in the context of the whole trial, and especially in light of the fact that the defendant's claim was that none of the government's witnesses were credible, and that the entire case of the government was a fabrication. *Id.* at 1119. So, too, here, the defendant argued that none of the government's witnesses could be believed, and that the F.B.I. had not properly performed its job in investigating the case. With the exception of the one complained of remark, all of the government's comments were restricted to a recitation of the facts in evidence. Under these circumstances, and in particular view of the fact that the jury was instructed to disregard the remark, see *United States v. Bivona*, *supra*; *United States v. Canniff*, *supra*, there was clearly no prejudice to the defendant.

IV.

The government's peremptory challenge of the only Black venireman did not deny appellant a fair trial.

The defendant claims that the government's challenge of the only black venireman on the jury panel in this case deprived him of a fair trial, and mandates reversal. This issue was raised in the case for the first time subsequent to the defendant's conviction by way of a motion for a

new trial, which was denied.⁷ In his motion for a new trial, the defendant used as a statistical basis the same statistics that had been relied upon in *United States v. Robinson*, 421 F. Supp. 467 (D. Conn. 1976), *rev'd sub nom. United States v. Newman*, 549 F.2d 240 (2d Cir. 1977).

What occurred when the jury was selected in this case with respect to the peremptory strike of the black venireman is reproduced in Appellant's Appendix at pp. 19-20. It is clear that the defendant did not object to the government's exercise of this peremptory challenge, but rather limited himself to placing on the record the fact that the peremptory had been used against a black. When the defendant sought to have the government set forth a non-racial reason for the exercise of the peremptory, the government declined so to do. As Judge Newman noted in *United States v. Robinson*, *supra* at 474:

It seems clear that no conviction already obtained and none obtained in the future could be successfully attacked because of a prosecution challenge of a Black venireman unless objection had been made at or before trial. See *Davis v. United States*, 411 U.S. 233, 93 S. Ct. 1577, 36 L. Ed. 2d 216 (1972); *Shotwell Manufacturing Company v. United States*, 371 U.S. 341, 83 S. Ct. 448, 9 L. Ed. 2d 357 (1963); *Leggroan v. Smith*, 498 F.2d 168, 171 (10th Cir. 1974).

And as the Tenth Circuit noted in *Leggroan v. Smith*, *supra*, at 171,

[A] defendant, by accepting a jury, waives his right to object to the panel. [citations omitted].

⁷ Note was made for the record of the government's use of a peremptory challenge against the black venireman when the jury was selected on February 1, 1977, but no motions were made at that time. The jury was accepted by the defendant despite the use of this peremptory. G.A. 1.

Such is precisely the situation here: at no time prior to the filing of a motion for a new trial did the defendant ever object to the jury panel as constituted.⁸ Therefore, the defendant, by not objecting to the jury panel and by proceeding to trial before the panel as selected, waived his objections to the jury panel which tried and convicted him.

Despite this court's decision in *United States v. Newman, supra*, the defendant, relying upon the same statistics as were used in *Newman*, seeks to have the judgment of conviction reversed. There is nothing in either the defendant's own statistics or in this court's decision which mandates this result.

With respect to the defendant's statistics, this court found that by making a composite of the figures for both the New Haven and Hartford divisions of court, the result was "accurate for neither the New Haven Division nor the Hartford Division." *United States v. Newman, supra*, at 244. And while the court noted that the rate of exclusion of black jurors in the Hartford Division falls below standard, it also observed:

The report on the Hartford Division about the number of Black veniremen who were peremptorily challenged by the Government in connection with several criminal trials presents those challenged as a fairly sizeable group of separate Black individuals, qualified for jury duty but cut off from the opportunity to serve because each had been struck by the Government. A study of the raw data, also furnished by the Federal Public Defender, discloses, however, that one of the group,

⁸ The Federal Public Defender, who was involved in *United States v. Robinson, supra*, also represented the defendant here at trial.

S. W. Shepherd, was struck no less than six times by the Government, while two others in the group, M. Angus and W. Williams, were struck five times each. Assuming that the researcher's statistical analysis counted each Government peremptory challenge as striking a qualified potential Black juror and disregarding the fact that the same individuals were being challenged several times, it appears, in effect, that three Black veniremen were singlehandedly responsible for no less than 16 peremptory challenges against Blacks in the Hartford Division. This counting of the same individuals several times, obscures the reliability and accuracy of the claimed facts and injects confusion into the real significance of the statistics.

United States v. Newman, supra, at 245 n.6.

Judge Newman's decision in *United States v. Robinson, supra*, was concerned with a continuing pattern of peremptory challenges directed at black veniremen. Nevertheless, the defendant has taken the *Robinson* statistics, which have already been seriously questioned by this court, and adds to them statistics concerning the performance of the Hartford Division alone since the ending point of the *Robinson* statistics. This is a distortion: if concern is with a continuing pattern,⁹ then attention should be paid to the pattern of peremptory challenges that has developed since the decision in *Robinson*. For "only a continued pattern of Black challenges at an excessive rate will encounter the risk of [successful attacks on convictions.]" *Robinson, supra*, at 475.

⁹ As Judge Newman noted,

Since the vice of the current practice is the *pattern* that has resulted, rather than the challenge of Blacks in a particular case, . . . *United States v. Robinson, supra* at 474 (emphasis in original).

From September 20, 1976 until March 8, 1977, twelve juries (not including the jury in this case) were impanelled to hear criminal cases in Hartford. In four of these trials, no Black veniremen were present in the panel to which peremptory challenges could be directed. In six of the twelve trials, one Black was present in the panel to which peremptories could be directed. And in two of the twelve cases, two Blacks were in the panel to which peremptories could be directed.

Four of the twelve juries finally impanelled contained one Black juror; one of the twelve contained two Black jurors.

The four trials in which no Black veniremen were present in the panel to which peremptories could be directed must be excluded from analysis: chance, not governmental action, caused the lack of Blacks in the panels to which peremptories could be directed. In five of the remaining eight trials, Blacks were impanelled.

In these eight trials, an average of 1.25 Black veniremen were present in the panel to which peremptory challenges could be directed. If a panel to which peremptory challenges could be directed contains 28 jurors, (12 jurors, plus 10 defense peremptories, plus 6 government peremptories), 1 of whom is Black (for ease of computation, and since a fractional juror cannot exist in fact, a figure of 1, rather than of 1.25, is used), a wholly random selection of panels containing 12 jurors, one of whom is Black, will occur approximately 43% of the time.

Yet in these eight trials, the final panels contained at least one Black approximately 63% of the time.

During the half-year period in which Defendant Robinson was tried, circumstances did not exist "under

which interrogation of a prosecutor as to the reasons for his long, consistently repeated peremptory challenges, exercised solely against Black veniremen to exclude them from sitting on a jury *might* be pursued." *United States v. Newman*, supra at 246, (interpreting *Swain v. Alabama*, 380 U.S. 202 (1965)). In fact Blacks sat on final jury panels more often than can be explained by mere chance.

Therefore, there is nothing in the record below to indicate that the defendant was denied a fair trial by reason of the exercise of the government's peremptory challenge of the black venireman.¹⁰ If anything, the previous pattern found in the Hartford Division has disappeared; the excessive rate that was Judge Newman's concern no longer exists.

CONCLUSION

For all the foregoing reasons, the government urges that the judgment of conviction be affirmed.

Respectfully submitted,

PETER C. DORSEY
United States Attorney
District of Connecticut

HAROLD JAMES PICKERSTEIN
Chief Assistant United States Attorney
270 Orange Street
New Haven, Connecticut 06508

¹⁰ It goes without saying that the granting of the government's mandamus petition in *United States v. Newman*, *supra*, has removed any requirements placed upon the government to account for his exercise of peremptory challenges, at least Blacks or anyone else.

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-1197

UNITED STATES OF AMERICA

Appellee

v.

WILLIAM EUGENE ROBINSON

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave
Brooklyn, New York

That on the 29th day of June, 1977, deponent served the within Brief for Appellee and Appendix
upon Andrew B. Bowman, Esq.
Federal Public Defender
770 Chapel Street, New Haven, Connecticut 06510

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

Albert Sensale

This 29th day of June 1977

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977

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